MALAYAN BANKING BHD v. SPARROWS & ARROWS SDN BHD & ORS

COURT OF APPEAL, PUTRAJAYA
HANIPAH FARIKULLAH JCA
LAU BEE LAN JCA
[CIVIL APPEAL NO: W-02(NCVC)(W)-413-03-2017]
19 AUGUST 2021

EVIDENCE: *Fresh evidence – Application for – Leave to admit further evidence – Whether further/fresh evidence to be adduced would have important influence on outcome of case – Whether application should be allowed – Courts of Judicature Act 1964, s. 69*

CIVIL PROCEDURE: *Res judicata – Estoppel – Assignor entered into sale and purchase agreement without assignee's consent – Parties and documentary evidence appeared/adduced before court – No challenge as to sale by way of counterclaim – Whether cause of action arose – Whether principle of res judicata applied in wider sense under cause of action estoppel*

LAND LAW: *Interest in property – Registered interest – Transfer of property – Whether registered interest and transfer valid – Whether transfer defeasible – Whether registration of transfer defeated all prior unregistered interests – Whether vitiating circumstances in s. 340(2)(a), (b) or (c) of National Land Code proved to defeat registered interest – Whether bank had legal interests and rights over property as assignee – Whether there was pre-planned and intent to commit fraud against bank*

The first respondent, ('Sparrows & Arrows') had purchased a unit ('Megan Avenue property') from the developer and took a loan from the appellant ('MBB') ('Sparrows & Arrows loan') to part finance the said purchase. Sparrows & Arrows assigned Megan Avenue property absolutely to MBB as security under the loan agreement cum assignment. Sparrows & Arrows however defaulted under the loan and MBB entered judgment for the sum of RM1,724,928.16 against Sparrows & Arrows and its guarantors, Chew and Ling, ('Sparrows & Arrows judgment'). Ling had two term loans with MBB ('Ling's accounts') and they were secured by a charge over a property ('Bukit Damansara property'). Ling defaulted and an order for sale ('OFS') in respect of the Bukit Damansara property was obtained. Messrs Nga Hock Cheh & Co ('Messrs NHCC'), of which the third and fourth respondents ('Nga' and 'Liang', respectively) were partners, was appointed as Ling's solicitors midway. The proceeds went to settle Ling's two term loans with MBB. Ling and Chew also had another account with MBB *via* a company called the Rock. This debt was sold by MBB to Gale Force and Gale Force obtained a judgment against the Rock, Ling and Chew for the sum of RM2,669,550.90 ('Gale Force judgment'). MBB entered into a consent judgment with HS

Dunamis, who secured two loans from MBB, Chew and Ling for the sum of RM286,560.44 as the sum of RM178,070.76 with interest and costs ('HS Dunamis judgment'). MBB and Chew agreed to settle the Sparrows & Arrows judgment at RM1,800,000. The settlement was payable by an initial payment of RM90,000 and the balance of RM1,710,000. If Chew breached the settlement, MBB was entitled to initiate execution proceedings to recover ('Chew's settlement'). In consequent to Chew's settlement, Ling proposed a global settlement of Ling's accounts, the Sparrows & Arrows judgment and the HS Dunamis judgment ('Ling proposal'). MBB rejected Ling's proposal and made a counter proposal. While the settlement was ongoing between Chew and Ling and MBB, Sparrows & Arrows entered into a sale and purchase agreement with the second respondent ('Kopetro') to sell the Megan Avenue property for the sum of RM3,850,000 ('SPA'). Gale Force had executed the Gale Force judgment ('Gale Force execution proceedings') and obtained a prohibitory order against Ling. Gale Force then applied for a direction to sell the Bukit Damansara property. The High Court allowed MBB to intervene but dismissed the application to set aside the prohibitory order and gave a direction for the Bukit Damansara property to be auctioned ('Gale Force OFS'). The Bukit Damansara property was auctioned for the sum of RM3,800,000. Messrs Wong & Co filed a suit at the High Court ('314 suit'), seeking: (i) a declaration that the payment of RM1,800,000 ('settlement sum') by Sparrows & Arrows and Ling to MBB would constitute the full and final settlement of the Sparrows & Arrows judgment; and (ii) a declaration that there was an agreement between Sparrows & Arrows, Ling and MBB and that the settlement sum be paid by way of the auction proceeds of the Bukit Damansara property. Sparrows & Arrows and Ling applied for an *ex parte* interlocutory injunction to prevent any dealings on the Megan Avenue property, pending the disposal of the 314 Suit. The court granted injunction and a consent order was entered between the parties on, among others: (i) in the interim, MBB allowed Sparrows & Arrows and Ling to proceed with the Megan Avenue property sale; and (ii) the proceeds of the Megan Avenue property sale were to be deposited in Sparrows & Arrows' bank account with MBB. Through an amended application, the OFS included the HS Dunamis account. The 314 Suit proceeded to trial and judgment was ordered in favour of Sparrows & Arrows and Ling ('24 October judgment'). Further directions were given as to the distribution of the proceeds from the Bukit Damansara property; for expenses to be paid first; RM1633,537.33 to be paid to MBB per the original OFS; RM3.022 million to be paid to Gale Force; and the balance would be paid to Ling ('10 October decision'). Hence, this appeal by MBB. Kopetro sought to adduce the cause papers in High Court Civil Suit ('Suit 172 pleadings'), pursuant to s. 69 of the Courts of Judicature Act 1964.

Held (dismissing appeal):

(1) Suit 172 was primarily based on professional negligence which caused MBB to lose the Megan Avenue property, which was assigned to MBB as security in respect of the loan taken by Sparrows & Arrows from MBB to part-finance the purchase of the property. In so far as the first condition for the reception of further evidence was concerned, MBB initiated Suit 172 against the firm in April 2018 whilst the trial of the action of the subject appeal had concluded and a decision was delivered. Therefore, the Suit 172 pleadings could not have been obtained with reasonable diligence for use at the trial. All that was required of the second condition was, sufficed that it be demonstrated that the further/fresh evidence to be adduced 'would probably have an important influence on the result of the case, although it need not be decisive'. Kopetro had fulfilled the second requirement. By the pleaded case of MBB in Suit 172, Kopetro had discharged its burden of showing that the actual stand taken by MBB was that their loss of interest over the Megan Avenue property was caused by the firm and/or their negligence. In relation to the third condition, the Suit 172 pleadings had fulfilled the requirement of being credible as it was to presume that MBB's solicitors, for the purpose of legal proceedings against the firm would surely plead facts which would be true, bearing in mind that pleadings, according to O. 18 r. 7 of the Rules of Court 2012 ('ROC') 'is a statement in a summary form of the material facts on which the party pleading relies for his claim'. Kopetro's leave to file the application and to admit the Suit 172 pleadings as further evidence in this appeal was allowed. (paras 38, 42, 45, 47 & 48)

(2) In the 314 Suit, the assignor was Sparrows & Arrows while the assignee was MBB. The cause of action had arisen since the entering of the SPA without the assignee's consent. The necessary parties and the documentary evidence *ie*, the SPA were also before the court. However, MBB chose not to challenge the sale to Kopetro by way of a counterclaim in the 314 Suit. Therefore, MBB was estopped by the principle of *res judicata* used in the wider sense under a cause of action estoppel. (para 55)

(3) The 24 October judgment superseded the interim consent order. The issue document of title of Megan Avenue property was issued on 7 April 2003. When Kopetro entered into the SPA with Sparrows & Arrows, the transaction was on the basis of a property with a title issued and on 22 June 2012, when Kopetro became the registered owner of the Megan Avenue property, Kopetro also created a charge in favour of its financier. However, from 2003 till the property was transferred and registered to Kopetro in 2012, MBB did nothing to secure its unregistered interest by (i) registering a charge on the property when it was contractually entitled to do so; and (ii) neither did MBB protect

their interest by way of a caveat. Instead, there was evidence that MBB's solicitors *via* its letter to Messrs NHCC, stated that (i) the sum of RM1,800,000 was to be paid from the proceeds of the auction sale of the Bukit Damansara property under the threat of contempt proceedings to Sparrows & Arrows; and (ii) compelling Sparrows & Arrows to complete the SPA within three months of the 24 October judgment. (paras 57-59)

(4) There were three events which undoubtedly demonstrated that MBB had particular knowledge that Sparrows & Arrows account could only be settled from the proceeds of the Bukit Damansara property as follows: (i) *vide* their amendment application to amend the OFS to include, among others, the Sparrows & Arrows account, MBB was aware as early as 21 July 2011 that their own election and request was not included in the indebtedness covered by the OFS; (ii) MBB knew from the 10 October decision that MBB was disallowed from including Sparrows & Arrows indebtedness/loan account in the distribution from the auction proceeds of the Bukit Damansara property; and (iii) MBB was aware that as at 24 October 2011, the entire auction proceeds of the Bukit Damansara property had been distributed out by their own solicitors in accordance with the 10 October decision that it was no longer possible to have Sparrows & Arrows loan account settled with monies from the auction proceeds of the Bukit Damansara property. Despite having the specific knowledge, MBB did nothing and did not even notify Kopetro, a party known to them that MBB would then seek settlement and redemption from the proceeds of the Megan Avenue property sale. (paras 62 & 63)

(5) Kopetro's registered interest in the Megan Avenue property was valid against the world at large and may only be challenged under s. 340(2) of the National Land Code ('NLC'). None of the vitiating circumstances in s. 340(2)(a), (b) or (c) of the NLC had been proved by MBB to defeat the registered interest of Kopetro. The registration of transfer of Megan Avenue property on 22 June 2012 under the NLC defeated all prior unregistered interests. (paras 76 & 84)

(6) The evidence showed that MBB had chosen the option to be paid from the proceeds of the auction of the Bukit Damansara property as its redemption money as reflected in the letter by MBB's solicitors and had not stipulated in the interim consent order given by MBB that the redemption money was to be deducted from the balance purchase price of the sale of the Megan Avenue property. Therefore, having lost in the tussle to Gale Force in the 314 Suit to obtain the proceeds of the auction sale of the Bukit Damansara property as its redemption money, MBB could not be allowed to approbate and reprobate, by changing the mode of collection of the redemption money. (para 89)

(7) MBB was not allowed to advance a position not taken at the High Court because to accede to the request of MBB by allowing the charge to remain in place when the transfer was expunged from the records would create an odd and incongruous situation of there being no registered proprietor/chargor but there being a charge on the title. MBB's reliance on ss. 215 and 216 of the NLC was misconceived since those provisions applied to a transfer of land and for the passing of all existing interests and restrictions then existing on the land. In the present appeal, both of the said provisions did not apply since MBB was asking for the expungement of Kopetro's title. It did not involve any transfer. (para 120)

Case(s) referred to:

Abdul Ghani Abdullah v. EON Bank Bhd; HLB Holdings Bhd (Third Party) [2010] 1 LNS 1796 HC ***(refd)***

Asia Hotel Sdn Bhd v. Malayan Insurance (M) Sdn Bhd [1992] 2 CLJ 1189; [1992] 2 CLJ (Rep) 121 HC ***(refd)***

Au Meng Nam & Anor v. Ung Yak Chew & Ors [2007] 4 CLJ 526 CA ***(refd)***

Cheah Theam Kheng v. City Centre Sdn Bhd (In Liquidation) & Other Appeals [2012] 2 CLJ 16 CA ***(refd)***

Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd [2001] 2 CLJ 321 CA ***(refd)***

CIMB Bank Bhd v. Veeran Ayasamy (Wakil Diri Kepada Letchimi Muthusamy, Si Mati) [2015] 7 CLJ 289 CA ***(refd)***

CKH Engineering Sdn Bhd v. Lim Beng Kit [2017] 1 LNS 286 CA ***(refd)***

Damai Freight (M) Sdn Bhd v. Affin Bank Bhd [2015] 4 CLJ 1 FC ***(refd)***

Datuk Seri Panglima Mohd Sari Datuk Hj Nuar v. Vee Seng Development Sdn Bhd & Ors [2009] 6 CLJ 102 CA ***(refd)***

Doshi v. Yeoh Tiong Lay [1974] 1 LNS 30 FC ***(refd)***

He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal [2020] 7 CLJ 271 FC ***(refd)***

Janagi v. Ong Boon Kiat [1971] 1 LNS 42 HC ***(refd)***

Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd [1999] 4 CLJ 533 CA ***(refd)***

Kasai Reiko v. Annie Lor Lee Fong & Ors; Public Bank Bhd (Intervener) [2014] 3 CLJ 869 HC ***(refd)***

Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd [2017] 5 CLJ 418 FC ***(refd)***

Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed [1998] 2 CLJ 340 CA ***(refd)***

Ng Ben Thong & Ors v. Krishnan Arumugam [1997] 1 LNS 85 HC ***(refd)***

Owe Then Kooi v. Au Thiam Seng & Anor And Another Case [1990] 1 CLJ 311; [1990] 2 CLJ (Rep) 600 HC ***(refd)***

PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd [1980] 1 LNS 55 FC ***(refd)***

Punca Klasik Sdn Bhd v. Foh Chong & Sons Sdn Bhd & Ors [1998] 1 CLJ 601 HC ***(refd)***

Renault SA v. Inokom Corporation Sdn Bhd & Anor And Other Applications [2010] 5 CLJ 32 CA ***(refd)***

Samuel Naik Siang Ting v. Public Bank Bhd [2015] 8 CLJ 944 FC ***(refd)***

SCK Group Bhd & Anor v. Sunny Liew Siew Pang & Anor [2010] 9 CLJ 389 CA ***(refd)***

Sim Thong Realty Sdn Bhd v. Teh Kim Dar [2003] 3 CLJ 227 CA ***(refd)***

Simpang Empat Plantation Sdn Bhd v. Ali Tan Sri Abdul Kadir & Ors [2006] 1 CLJ 41 CA ***(refd)***

A *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 7 CLJ 584 FC* ***(refd)***
Tai Lee Finance Co Sdn Bhd v. The Official Assignee Of The property Of Ngan Kim Yong & Ors [1983] 1 CLJ 183; [1983] CLJ (Rep) 387 FC ***(refd)***
Teoh Kien Peng & Anor v. Thannimalai Subramaniam [2009] 1 LNS 308 CA ***(refd)***
Three Rivers District Council And Others v. Bank of England (No 3) [2001] 2 All ER 513 ***(refd)***
B *Yat Tung Investment Co Ltd v. Dao Heng Bank Ltd And Another [1975] AC 581* ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 69(3)
National Land Code, ss. 215, 216, 340(1), (2)(a), (b), (c), 418
Rules of Court 2012, O. 18 r. 7
C Rules of the Court of Appeal 1994, r. 7(3)

For the appellant - Ng Sai Yeang, Wong Chee Chien & Yenne Chow; M/s Raja, Darryl & Loh
For the 1st respondent - Cheang Lek Choy; M/s Lek Choy & Co
For the 2nd respondent - Rajashree Suppiah & Kuan Kai Tat; M/s Mei Fun & Rajashree
D *for the 3rd respondent - Yeoh Cho Kheong & Lee Mei Xian; M/s Ranjit Singh & Yeoh*
For the 4th respondent - Lim Kian Leong & Tobias Lim; M/s Lim Kian Leong & Co

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Suit No: 22(NCVC)-361-07-2014 (affirmed).]

Reported by Lina E
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JUDGMENT

Lau Bee Lan JCA:

Introduction

F **[1]** This appeal was brought by the appellant/plaintiff against the decision of the learned High Court Judge made on 23 February 2017 dismissing the appellant/plaintiff's claim against the first, second, third and fourth respondents/first, second, third and fourth defendants with costs of RM400,000 on an indemnity basis ie, RM100,000 per respondent/
G defendant.

[2] We shall refer to the parties as follows: appellant/plaintiff as MBB, first to fourth respondents/first to fourth defendants as Sparrows & Arrows, Kopetro, Nga and Liang, respectively.

H **[3]** This court had directed that the second respondent/second defendant's notice of motion (encl. 16a) to adduce fresh evidence be heard and disposed of together with the appeal proper. Having heard and considered the respective parties' oral and written submissions and the relevant records of appeal, we had adjourned the appeal for decision after requesting the parties
I to submit further on issues which arose at the hearing on 19 June 2020, namely: (i) can a lawyer carrying out his legal duty be found liable for abuse

of process?; (ii) can fraud be established if there is no benefit/advantage gained by the perpetrator?; and other issues which arose during the hearing. This is our judgment in respect of the appeal proper and Kopetro's notice of motion (encl. 16a) to adduce further evidence.

Brief Facts

[4] The brief facts relevant to this appeal are these. On 13 September 1995, *vide* a sale and purchase agreement of even date, Sparrows & Arrows purchased Unit No. B-05-G, Ground Floor, Block B, Phileo Avenue Parcel 64, Tingkat 1, Bangunan M1-B, Lot 144, Seksyen 44 Bandar Kuala Lumpur ("the Megan Avenue property") from AAB Avenue 11 Sdn Bhd ("the developer").

[5] On 23 April 1997, Sparrows & Arrows took a loan from MBB ("the Sparrows & Arrows loan") to part-finance the purchase of the Megan Avenue property and assigned the same absolutely to MBB as security under the loan agreement cum assignment ("LACA") dated 23 April 1997.

[6] Sparrows & Arrows defaulted under the loan. On 2 April 2008, MBB entered summary judgment *vide* Shah Alam High Court Suit No. MT1-22-421-2006 ("SAHC Suit") for the sum of RM1,724.928.16 as at 31 January 2006 with interest and costs against Sparrows & Arrows and the guarantors, Chew Nee Hee ("Chew") and Ling Yun Yoke ("Ling") ("the Sparrows & Arrows judgment").

[7] Ling had two term loans with MBB bearing two different account numbers: 414329200112 and 414329200105 ("Ling's accounts'). Ling's accounts were secured by a charge over a property bearing residential address of No. 4, Jalan Setiabakti, Bukit Damansara, Kuala Lumpur ("the Bukit Damansara property").

[8] Ling defaulted and an order for sale in respect of the Bukit Damansara property was obtained against Ling on 22 November 2010 ("the OFS") *via* the Kuala Lumpur High Court Originating Summons No. S-24-223-2010 ("the 223 OS"). The proceeds went to settle Ling's two term loans with MBB.

[9] Messrs Nga Hock Cheh & Co ("Messrs NHCC"), of which Nga and Liang are partners, was only appointed as Ling's solicitors midway through the 223 OS *via* a notice of change of solicitors dated 20 May 2011.

[10] Ling and Chew had another account with MBB *via* a company called the Rock. This debt was sold by MBB to Gale Force. On 22 December 2009, *vide* Kuala Lumpur High Court Civil Suit No. D5-22-1615-225 ("the Gale Force suit"), Gale Force obtained a judgment against the Rock (who had secured loan from MBB), Ling and Chew (as guarantors), for the sum of RM2,669,550.90 as at 26 November 2009 together with interest and costs ("Gale Force judgment").

[11] On 29 October 2010, MBB entered into a consent judgment with HS Dunamis (who secured two loans from MBB), Chew and Ling (both stood as guarantors) for the sum of RM286,560.44 as at 30 September 2004 and the sum of RM178,070.76 as at 30 September 2004 with interest and costs ("HS Dunamis judgment").

[12] *Via* letters dated 26 October 2010 and 28 October 2010, MBB and Chew agreed to settle the Sparrows & Arrows judgment at RM1,800,000. The settlement was payable by an initial payment of RM90,000 and the balance RM1,710,000 by 29 March 2011. If Chew breached the settlement, MBB was entitled to initiate execution proceedings to recover ("Chew's settlement").

[13] Following Chew's settlement, *via* a letter dated 2 February 2011, Ling proposed a global settlement of Ling's accounts, the Sparrows & Arrows judgment and the HS Dunamis judgment (Ling's proposal").

[14] *Via* letter dated 9 March 2011, MBB confirmed all accounts were consolidated.

[15] *Via* letter dated 30 March 2011, MBB rejected Ling's proposal for a global settlement.

[16] *Via* letter dated 23 May 2011, MBB made a counter proposal to Ling's proposal.

[17] MBB filed proof of debt dated 3 March 2014 against Sparrows & Arrows, which showed that the judgment sum has increased to RM3,543,428.69 as at 13 January 2014, being the redemption sum for Megan Avenue property.

[18] While the settlement was ongoing between Chew and Ling and MBB, Sparrows & Arrows entered into a sale and purchase agreement dated 12 November 2010 with Kopetro to sell the Megan Avenue property for the sum of RM3,850,000 ("SPA"). The SPA was prepared by Messrs Abdul Rahman Azubir & Co with no involvement from Messrs NHCC. Kopetro paid RM103,000 and RM977,00 to Sparrows & Arrows and released the balance purchase price by a loan taken from CIMB on 20 January 2012.

[19] Gale Force executed the Gale Force judgment *vide* Kuala Lumpur High Court Execution No. 36-11-2010 ("Gale Force execution proceedings') and obtained a prohibitory order against Ling on 20 July 2010.

[20] By a summons in chambers dated 27 October 2010, Gale Force applied for directions to sell the Bukit Damansara property.

[21] MBB then applied to intervene in the Gale Force execution proceedings and to set aside the prohibitory order.

[22] On 31 January 2011, the High Court (i) allowed MBB to intervene but dismissed the application to set aside the prohibitory order; and (ii) gave directions for the Bukit Damansara property to be auctioned on 17 March 2011 ("Gale Force OFS"). A

[23] By summons in chambers dated 9 March 2011, MBB re-applied to set aside the prohibitory order. On 16 March 2011, the High Court varied the Gale Force OFS, directed that the proceeds of the auction of the Bukit Damansara property be deposited with MBB but that it shall not affect the payment of the said sum until further directions are obtained. B

[24] The Bukit Damansara property was auctioned on 17 March 2011 for the sum of RM3,800,000. C

[25] On 15 April 2011, Messrs Wong & Co filed the Kuala Lumpur High Court Suit No. 22 NCVC 314-2011 ("the 314 Suit") seeking, among others, the following reliefs:

(i) a declaration that the payment of RM1,800,000 ("settlement sum") by Sparrows & Arrows and Ling to MBB would constitute the full and final settlement of the Sparrows & Arrows judgment; and D

(ii) a declaration that there was an agreement between Sparrows & Arrows, Ling and MBB and that the settlement sum be paid by way of the auction proceeds of the Bukit Damansara property on 17 March 2011. E

[26] By a summons in chambers dated 15 April 2011, Sparrows & Arrows and Ling applied for an *ex parte* interlocutory injunction to prevent any dealings on the Megan Avenue property, pending the disposal of the 314 Suit. The court granted the *ex parte* injunction on 18 April 2011. F

[27] On 20 June 2011, Messrs NHCC took over the conduct of the 314 Suit.

[28] At the *inter partes* hearing of the injunction application, a consent order dated 22 June 2011 was entered between the parties on, among others, the following terms: G

(i) that in the interim, MBB allowed Sparrows & Arrows and Ling to proceed with the Megan Avenue property sale; and

(ii) that the proceeds of the Megan Avenue property sale were to be deposited in Sparrow & Arrow's bank account with MBB. H

[29] *Via* an amendment application, MBB applied to amend the OFS to include the Sparrows & Arrows loan and the HS Dunamis account into the OFS. The amended OFS of 21 July 2011 included the HS Dunamis account but not the Sparrows & Arrows loan as the parties could not come to an agreement on the amount payable by Sparrows & Arrows. I

[30] The 314 Suit proceeded to trial and judgment was ordered in favour of Sparrows & Arrows and Ling on 24 October 2011 ("24 October 2011 judgment") by the learned High Court Judge, Vazeer J (now JCA) as follows:

(i) a declaration that payment of the settlement sum by Sparrows & Arrows and Ling to MBB would constitute the full and final settlement of the Sparrows & Arrows judgment;

(ii) the settlement sum was to be paid by the auction proceeds of the Bukit Damansara property;

(iii) the SPA was to be perfected within three months of 24 October 2011 judgment; and

(iv) the parties are at liberty to apply.

[31] On 10 October 2011, YA Lee Swee Seng JC (now JCA) gave further directions as to the distribution of proceeds from the Bukit Damansara property: for expenses to be paid first; RM1,633,537.33 to be paid to MBB per the original OFS; RM3.022 million was to be paid to Gale Force; and the balance would be paid to Ling ("10 October 2011 decision").

[32] The learned judge dismissed MBB's claim after a full trial. Hence this appeal by MBB.

High Court Decision

[33] The learned judge found that MBB failed to discharge its burden of proof on a balance of probabilities against Sparrows & Arrows, Kopetro, Nga and Liang (the first, second, third and fourth defendants).

[34] In respect of MBB's claim against Sparrows & Arrows, the learned judge held that although Sparrows & Arrows elected not to call evidence, MBB failed to prove its case of abuse of process, misrepresentation, suppression of facts and fraud to sustain a finding in its favour.

[35] In respect of MBB's claim against the Kopetro, the learned judge held Kopetro to be a *bona fide* purchaser.

[36] In respect of MBB's claim against Nga and Liang, the learned judge held that MBB failed to prove to the satisfaction of the court that there had been an abuse of process and that Sparrows & Arrows, Kopetro, Nga and Liang (the defendants) were the perpetrators.

Our Decision

Application To Adduce Further Evidence

[37] Preliminarily, we shall deal with Kopetro's notice of motion (encl. 16a) to adduce further evidence. Kopetro seeks to adduce the cause papers in Kuala Lumpur High Court Civil Suit No. WA-22NCvC-172-04/2018) ("the 172 Suit pleadings') pursuant to s. 69 of the Courts of Judicature Act 1964 (Act 91) ("the CJA").

[38] It is an undisputed fact that on 3 April 2018, MBB filed WA-22NCvC-172-04/2018 ("Suit 172") against their previous solicitors, the partners of Messrs Lua and Mansor ("the firm"). Suit 172 is primarily based on professional negligence, which caused MBB to lose the Megan Avenue property, which was assigned to MBB as security in respect of the loan taken by Sparrows & Arrows from MBB to part-finance the said purchase of the said property.

[39] Section 69, CJA, among others, provides:

> 69. (1) Appeals to the Court of Appeal shall be by way of r-hearing, and in relation to such appeals the Court of Appeal shall have all the powers and duties, as to amendment or otherwise, of the High Court, together with full discretionary power to receive further evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner.
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> (3) Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, **the further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the Court of Appeal**.
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> (emphasis added)

[40] In *Datuk Seri Panglima Mohd Sari Datuk Hj Nuar v. Vee Seng Development Sdn Bhd & Ors* [2009] 6 CLJ 102; [2009] 2 MLRA 349 Abdul Malik Ishak JCA (as he then was) (delivering the judgment of the court), among others, stated as follows:

> [16] ... *In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.*
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> [17] And according to three Malaysian Court of Appeal cases, the conditions stipulated in *Ladd v. Marshall* are to be read cumulatively and not disjunctively. See *Ing Merchant Bank (Singapore) Ltd & Anor v. Dato' Mohamed Anuar bin Embong* [2001] 4 CLJ 73 CA; *Maju Holdings Sdn Bhd v. Fortune Wealth (H-K) Ltd and Other Appeals* [2004] 4 CLJ 282 CA; and *Maxisegar Sdn Bhd v. Silver Concept Sdn Bhd* [2005] 3 CLJ 238 CA.
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> [18] And if the appellant defendant fails to satisfy one condition, he fails altogether.
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> (emphasis added)

Further, His Lordship at para. 23 made reference to an unreported dissenting judgment in the Court of Appeal *via* Civil Appeal No: P-04-50-2006, *Teoh Kien Peng & Anor v. Thannimalai Subramaniam* [2009] 1 LNS 308; [2008]

3 MLRA 647 where His Lordship considered the meaning to be ascribed to the phrase "special grounds" in the context of r. 7(3), Rules of the Court of Appeal 1994 and, among others, stated as follows:

> [49] The phrase "special grounds" appears in rule 7(3) of the Rules of the Court of Appeal 1994. The old English R.S.C. Order 59, rule 10(2), also makes reference to the phrase "special grounds: and the relevant part provides as follows: "no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on "special grounds". Hale LJ writing for the English Court of Appeal in? *Hertfordshire Investments Ltd. v. Bubb And Another* [2000] 1 WLR 2318 had this to say at page 2324 in regard to the phrase "special grounds". This was that what His Lordship Hale LJ said:
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> > Special grounds, as we all know, meant that the fresh evidence satisfied the principles in *Ladd v. Marshall* [1954] 1 WLR 1489: that is, that it could not have been obtained with reasonable diligence for use at trial; if given it would probably have had an important influence on the result of the case; and it is apparently credible although not incontrovertible; although there are exceptional cases in which those principles do not apply, for example those involving the welfare of children.

[41] We agree with the view expressed on the meaning to be ascribed to the phrase "special grounds" employed in r. 7(3) of the Rules of the Court of Appeal 1994 in *Teoh Kien Peng* (*supra*) and similarly adopt the approach therein in construing the same phrase which appears in s. 69(3), CJA.

[42] In so far as the first condition for the reception of further evidence is concerned, MBB initiated Suit 172 against the firm in April 2018 whilst the trial of the action of the subject appeal before us had concluded and a decision was delivered on 23 February 2017. It is clear, therefore, that Suit 172 pleadings could not have been obtained with reasonable diligence for use at the trial.

We observe that MBB did not dispute that the first condition has been met. Nevertheless, counsel for MBB argues that Kopetro's application to adduce the Suit 172 pleadings as further evidence has no legal basis in that pleadings are not even evidence citing *Ng Ben Thong & Ors v. Krishnan Arumugam* [1997] 1 LNS 85; [1998] 5 MLJ 579 (HC).

We do not disagree that pleadings are not evidence. However, it is our respectful view that it does not detract from the fact that the Suit 172 pleadings which Kopetro is seeking to admit as further evidence constitute evidence, pleadings wise, to fortify Kopetro's contention that MBB is taking the same stand in initiating Suit 172, in that the loss of the Megan Avenue property is due to the negligence of MBB's previous solicitors and not due to grounds under s. 340(2) of the National Land Code ("NLC"). We shall elaborate further below.

[43] Regarding the second condition, counsel for MBB submits: A

(i) that the Suit 172 pleadings are not relevant as they would not have any influence on the outcome of the decision of the appeal; and

(ii) that MBB's allegations against the firm in the 172 Suit do not change the main facts substantiating the appeal against Kopetro, Sparrows and Arrows, Nga and Liang as follows: B

(a) At all times, Sparrows & Arrows assigned the Megan Avenue property absolutely to MBB, Sparrows and Arrows, Kopetro and their solicitors knew this, including Nga and Liang;

(b) Kopetro was aware of MBB's interest and that Megan Avenue property had to be redeemed from MBB but yet Kopetro took the transfer without payment to MBB; C

(c) The defendants orchestrated the transfer of the Megan Avenue property to Kopetro and MBB maintains they are liable; and D

(d) The 172 Suit against the firm does not approbate from the narrative above and would have no effect on the appeal.

[44] Having perused the Suit 172 pleadings, particularly, paras. 26 and the subparagraphs thereunder, 27 and 28, we agree with the submission of counsel for Kopetro that the particulars of negligence against the firm relied on by MBB in Suit 172 can be summarised as follows: E

(i) not collecting title deed to the Megan Avenue property, which was issued since 2003;

(ii) not perfecting their charge (which would have given them indefeasibility and priority over the second respondent); F

(iii) not obtaining a stay pending their appeal;

(iv) not seeking any consequential order from the Court of Appeal on the Megan Avenue property; G

(v) not seeking to secure the proceeds of the sale (with reference to the 24 October 2011 judgment);

(vi) not lodging a caveat against the Megan Avenue property;

(vii) not appealing against the 10 October 2011 decision in the Kuala Lumpur High Court Suit 36-11-2010; and H

(viii) not informing the High Court of the amendment order (which clearly excluded Sparrows & Arrows' debt from the foreclosure proceeds/ proceedings) therefore, there was no way whatsoever the proceeds from the Bukit Damansara property could have been used to settle Sparrows & Arrows' debt. I

[45] It is worthy to remind ourselves that all that is required of the second condition is, it suffices that it be demonstrated that the further/fresh evidence to be adduced "would probably have an important influence on the result of the case, although it need not be decisive." We are satisfied that Kopetro has fulfilled the second requirement: by the pleaded case of MBB in Suit 172, Kopetro has discharged its burden of showing that the actual stand taken by MBB is that their loss of interest over the Megan Avenue property is caused by the firm and/or their negligence (as MBB's agent), which is contrary to MBB's position taken in this appeal alleging that their interest over the Megan Avenue property was lost within the ambit of s. 340(2), NLC, in particular, fraud, forgery, misrepresentation and insufficient or void instrument.

[46] Liang supports Kopetro's notice of motion. Counsel for Liang submits MBB's allegations made in Suit 172 are contrary to MBB's position in the present appeal. We find there is merit in this submission. We reiterate whilst in Suit 172, MBB is alleging that their loss of interest over the Megan Avenue property was caused by the negligence of their former solicitors, in the present appeal, we find MBB is alleging against Nga and Liang that their loss of interest in the said property was caused by;

(i) a failure to inform Justice Vazeer Alam on 24 October 2021, when His Lordship's judgment was being delivered, it was inconsistent with the prior 10 October 2011 decision of Justice Lee Swee Seng; and

(ii) conspiracy between Nga, Liang and Sparrows & Arrows to commit fraud, among others, by filing frivolous suits and misleading parties without protecting MBB's interest.

[47] In relation to the third condition, we are satisfied that the Suit 172 pleadings fulfilled the requirement of being credible as it is to presume that MBB's solicitors for the purpose of legal proceedings against the firm, would surely plead facts which would be true, bearing in mind that pleadings, according to O. 18 r. 7, Rules of Court 2012 "is a statement in a summary form of the material facts on which the party pleading relies for his claim."

[48] Since we find that the three requirements to constitute "special grounds" under s. 69, CJA and as established in *Datuk Seri Panglima Mohd Sari Datuk Hj Nuar* (*supra*), have been made out, we allow the Kopetro's notice of motion (encl. 16a) ie, leave to file the application and to admit the Suit 172 pleadings as further evidence in this appeal.

Merits Of The Appeal

Whether MBB Has Legal Interests And Rights Over The Megan Avenue property As Assignee

[49] On the grounds of appeal regarding this primary issue, it is not disputed that the Megan Avenue property was absolutely assigned by Sparrows & Arrows to MBB under the LACA. MBB contends that (i) they

never received any of the payment owed by Sparrows & Arrows under the LACA in respect of the Sparrows & Arrows judgment; (ii) they retained their interests over the Megan Avenue property even when the strata title to the said property was issued on 7 March 2003; and (iii) the developer, Phileo Avenue Sdn Bhd had notice of the assignment as shown in the endorsement (p. 312 CB2/3) where they undertook to forward the memorandum of transfer in favour of the borrower (Sparrows & Arrows) and as a bare trustee, the developer ought not to have acted against MBB's assigned interest and the transfer to Kopetro was invalid.

[50] It is a fact that at the point of time when the SPA was entered into, MBB's consent was not obtained since DW1 (Khairu Najhan bin Zainuddin) gave unrebutted evidence that Kopetro only came to know of MBB's interest after seeing an auction notice of the Megan Avenue property. In fact, Kopetro's solicitor conducted a land search and found the said property to be unencumbered, bearing a clean title. Having knowledge of MBB's interest, there was evidence from Kopetro that they and their lawyer immediately made attempts to meet with MBB. This fact was confirmed by SP2 (Miss Mak Kuan Teng) (Q&A 28, SP2's witness statement). However, we cannot ignore in the chronology of events, there was the entry of the interim consent order dated 22 June 2011 between Sparrows & Arrows and Ling (plaintiffs) and MBB (defendant) made under the 314 Suit, which we have alluded to in para. 28 above.

[51] For ease of reference, the relevant extract from the interim consent order reads?

> MAKA ADALAH DIPERINTAHKAN SECARA INTERIM, sementara menunggu perbicaraan penuh bahawa:
>
> 1. Plaintif-plaintif dibenarkan untuk meneruskan dengan penjualan hartanah plaintiff Pertama yang dipegang di bawah hakmilik induk HS(D) 84228 PT No. 19 Seksyen 44, Kuala Lumpur dan kini di bawah hakmiik strata Geran 37731/M1-B January 64, Lot 144 Seksyen 44 Bandar Kuala Lumpur Daerah dan Negeri Wilayah Persekutuan Kuala Lumpur dengan alamat di No. B-0-5, Blok B, Megan Avenue II, No. 12 Jalan Yap Kwan Seng, 50450 Kuala lumpur kepada Koperasi Kakitangan Petronas Berhad di bawah Perjanjian Jual Beli bertarikh 12hb November 2010 (selepas ini dirujuk sebagai "Perjanjian tersebut");
>
> 2. Sebarang bayaran lanjut di bawah Perjanjian tersebut hendaklah dibayar ke dalam akaun Plaintif Pertama yang disimpan di bank Defendan dan jumlah bayaran tersebut hendaklah dikekalkan untuk tujuan mengurangkan faedah ke atas pinjaman tertunggak Plaintif Pertama sementara pelupusan muktamad tindakan ini.
>
> DAN AKHIRNYA DIPERINTAH bahawa pihak-pihak diberi kebebasan untuk memohon.

[52] Counsel for MBB contends that it was an interim measure whereby they had only at one time consented to the sale of the Megan Avenue property by Sparrows & Arrows to Kopetro, which order was subject to the purchase price of the Megan Avenue property being paid to Sparrows & Arrows' bank account kept with MBB.

[53] Based on para. 1 of the interim consent order, we agree with the submission of counsel for Sparrows & Arrows and Kopetro that MBB had consented to the sale of the Megan Avenue property under the SPA dated 12 November 2010 by Sparrows & Arrows to Kopetro. Notwithstanding para. 2 of the interim consent order provides the purchase price of the Megan Avenue property being paid to Sparrows & Arrows' bank account kept with MBB as MBB submits, we are compelled to agree with the submission of counsel for Sparrows & Arrows that MBB failed to stipulate in the said interim consent order any deduction or retention of any portion of the purchase price to settle the redemption sum in respect of the outstanding loan owed by Sparrows & Arrows.

[54] Further, in our view, what is also pertinent is, as Kopetro submits, MBB has never challenged the interim consent order at any time; be it to set aside the interim consent order or take any action in respect of the alleged non-compliance of the said order, in the High Court suit under appeal before us. Counsel for Kopetro submits MBB's failure is estopped by the principle of *res judicata* as elucidated in *Simpang Empat Plantation Sdn Bhd v. Ali Tan Sri Abdul Kadir & Ors* [2006] 1 CLJ 41; [2005] 2 MLRA 576 where Gopal Sri Ram JCA (as he then was) (delivering the judgment of the Court of Appeal), quoting *Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd* [2001] 2 CLJ 321; [2001] 4 MLJ 346 at pp. 51-52 (CLJ); pp. 578-579 (MLJ), among others, opined:

> Now, *res judicata* is not merely a technical rule of pleading. It is a doctrine of substantial justice. *It is a process whereby justice is achieved procedurally by precluding a party from re-agitating in subsequent proceedings a complaint or an issue that has, or could fairly have been disposed in earlier proceedings between the same parties or their privies*. It is merely equity in action in the procedural arena. It is sometimes referred to as the rule in *Henderson v. Henderson* [1843] 67 ER 313. In that case, Wigram WC said:
>
> > In trying this question I believe I state the rule of the court correctly when I say that, *where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case*, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. *The plea of res judicata applies, except in special cases, not*

only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

The doctrine may thus be seen to encompass several categories. In its narrowest sense, *res judicata*, I think, refers to estoppel by record. It refers to the actual decision of the earlier action or proceeding. *In its wider sense, it encompasses issues and causes of action that could justly and fairly have been equally adjudicated in the earlier suit or proceeding*. This wider operation of the doctrine is sometimes referred to 'constructive *res judicata*'. It *houses the twin concepts of issue estoppel and cause of action estoppel*. Like the tree of which they form the branches, they are designed to ensure that there is finality in litigation.

(emphasis added)

[55] Applying the said principle to the present appeal: In the 314 Suit, the assignor (Sparrows & Arrows) and the assignee (MBB) were before the court. The cause of action had arisen since the entering of the SPA without the assignee's consent on 12 November 2010. The necessary parties and the documentary evidence, ie, the SPA, were also before the court. However, as Kopetro submits, MBB chose not to challenge the sale to Kopetro by way of a counterclaim in the 314 Suit. We agree with Kopetro's submission that MBB is estopped by the principle of *res judicata* used in the wider sense under a cause of action estoppel. Likewise, Sparrows & Arrows canvassed the same argument citing *Yat Tung Investment Co Ltd v. Dao Heng Bank Ltd And Another* [1975] AC 581 at p. 589 G-H and p. 590 A-B.

[56] It is not disputed that on 24 October 2011, Justice Vazeer, under the 314 Suit, made the final order, ie, the 24 October 2011 judgment, the material provisions ordered therein are referred to in para. 30 above. Of significance is para. (c) of the 24 October 2011 judgment, which reads:

(c) Penjualan hartanah Plaintif Pertama yang dipegang di bawah hakmilik induk HS(D) 84228 PT. No. 19 Seksyen 44, Kuala Lumpur dan kini di bawah hakmilik Strata Geran 37731/M1-B/1/64, Lot 144 Seksyen 44 Bandar Kuala Lumpur Daerah dan Negeri Wilayah Persekutuan Kuala Lumpur dengan alamat di No. B-0-5, Blok B, Megan Avenue II, No. 12 Jalan Yap Kwan Seng, 50450 Kuala Lumpur kepada Koperasi Kakitangan Petronas Berhad di bawah Perjanjian Jual Beli bertarikh 12hb November 2010 hendaklah disempurnakan sepenuhnya dalam masa 3 bulan daripada tarikh perintah ini.

[57] We accept that the 24 October 2011 judgment superseded the interim consent order, a position taken by MBB and Liang in submission. Counsel for MBB contends that knowledge of MBB's solicitors that there would not be any proceeds of sale from the Bukit Damansara property to be used to pay the Sparrows & Arrows judgment is irrelevant because the respondents who were well aware of MBB's assignment over the Megan Avenue property knew that it should not be redeemed without the consent of MBB.

[58] With respect, we find there is no merit in the aforesaid contentions of MBB. The issue document of title of Megan Avenue property was issued on 7 April 2003. When Kopetro entered into the SPA with Sparrows & Arrows on 12 October 2010, the transaction was on the basis of a property with a title issued, and on 22 June 2012, when Kopetro became the registered owner of the Megan Avenue property, Kopetro also created a charge in favour of its financier, CIMB Islamic Bank Berhad ("CIMB"). However, from 2003 till the said property was transferred and registered to Kopetro on 22 June 2012, we find MBB did nothing to secure its unregistered interest by (i) registering a charge on the said property when it was contractually entitled to do so and (ii) neither did MBB protect their interest by way of a caveat.

[59] Instead, there was evidence that MBB's erstwhile solicitors, Messrs Lua & Mansor, *via* its letter of 2 November 2011 to Messrs NHCC, stated that (i) the sum of RM1,800,000 was to be paid from the proceeds of the auction sale of the Bukit Damansara property under the threat of contempt proceedings to Sparrows & Arrows; and (ii) compelling Sparrows & Arrows to complete the SPA within three months of the 24 October 2011 judgment. This is clearly evident from the following material parts of the said letter:

> We refer to the above matter and judgment obtained on 24-10-2011.
>
> Without prejudice to our pending appeal to the Court of Appeal against the judgment, we write to demand the judgment sum from your client as follows:
>
> (1) RM1,800,00-00 as at 9-3-2011 together with interest rate as per judgment dated 2-4-2009 until full settlement;
>
> (2) The said sum to be paid from the proceed of the sale of the second plaintiff's property known as GRN 59884 Lot no 45255, Mukim of Kuala Lumpur, Districts of Kuala Lumpur, State of Wilayah Persekutuan together with double storey detached house erected on its bearing postal address of No. 41, Jalan Setiabakti, Bukit Damansara, 50490 Kuala Lumpur;
>
> (3) Kindly complete the sale and purchase agreement dated 12-11-2010 between the First plaintiff and Koperasi Kakitangan Petronas Berhad within 3 months from the date of the judgment 24-10-2011.
>
> (a) Item (1) to be paid to our client on or/before 7 days from the date of this letter.
>
> (b) Item (2) to be complied as per court's order, failing which we shall file contempt proceeding against your client.

It is crucial to note that Miss Mak (SP2), during lengthy cross-examination, agreed to several matters, the net effect of which is unfavourable to MBB towards proving its claim. The evidence agreed by Miss Mak in cross-examination, among others, include the following:

(i) she had instructed Messrs Lua & Mansor to send the two letters dated 2 November 2011 referred in para 64 below to Messrs NHCC;

(ii) concerning the 2 November 2011 letter, she knew that the auction proceeds had been released and despite this, she still insisted that the redemption sum must come from the auction proceeds;

(iii) that plaintiff's demand to pay the redemption sum from the auction proceeds failing which the first defendant would be in contempt was unreasonable;

(iv) that when Nga and Liang received the letter dated 2 November 2011 from Messrs Jai & Lim and the two letters also dated 2 November 2011 from Messrs Lua & Mansor, it was reasonable for them to take the view that "whatever else they must do, the sale and purchase agreement must be completed."; and

(v) that from the 2 November 2011 letters, there was no obligation for Messrs NHCC to act as stakeholders and for them to pay the money to the plaintiff.

[60] It is significant that MBB took no steps to secure the proceeds of the sale. Based on the evidence of SP3 (Puan Rafeah Shaharom), the following can be gathered:

(i) The contractual obligation to pay the sums indebted under LACA and redeem the Megan Avenue property is owed by Sparrows & Arrows (the borrower).

(ii) However, under the 24 October 2011 judgment, the money to pay off the settlement sum by Sparrows & Arrows and Ling to MBB was to come from the sale of the Bukit Damansara property and not the proceeds of the Megan Avenue property as reflected in para. 30(ii) above.

(iii) Puan Rafeah confirmed that nothing was done by her despite having the particular knowledge that after complying with the 10 October 2011 decision, all the auction proceeds of the Bukit Damansara property had been distributed in accordance with the said order, there was nothing left to pay off the settlement sum (the point on lack of communication between the inter departments of Puan Rafeah and Miss Mak within MBB shall be addressed later).

[61] Further, despite the exhaustion of proceeds, MBB or its erstwhile solicitors, Messrs Lua & Mansor chose not to avail themselves of the remedy available under para. (d) "the parties are at liberty to apply" in the 24 October 2011 judgment.

[62] We find there are three events which undoubtedly demonstrate that MBB had particular knowledge that Sparrows & Arrows account could not be settled from the proceeds of the Bukit Damansara property as follows:

(i) Firstly, *vide* their amendment application to amend the OFS to include, among others, the Sparrows & Arrows account (loan account 414570202078), MBB was aware as early as 21 July 2011 that their own election and request was not included in the indebtedness covered by the OFS.

(ii) Secondly, MBB knew from the 10 October 2011 decision, that MBB was disallowed from including Sparrows & Arrows indebtedness/loan account in the distribution from the auction proceeds of the Bukit Damansara property.

(iii) Thirdly, MBB was aware that as at 24 October 2011, the entire auction proceeds of the Bukit Damansara property had been distributed out by their own solicitors in accordance with the 10 October 2011 decision and that it was no longer possible to have Sparrows & Arrows loan account settled with monies from the auction proceeds of the Bukit Damansara property. This is evident from Messrs Jai & Lim's reply letter of 2 November 2011 (p. 586 CB 3/3) to Messrs NHCC's request to withhold the money (as the 24 October 2011 judgment was in favour of Sparrows & Arrows and Ling) by stating that the balance proceeds of the Bukit Damansara property have been forwarded to Gale Force Sdn Bhd as the 10 October 2011 decision precedes the 24 October 2011 judgment and "failure to comply would have amounted to contempt of the court order".

[63] Despite having the specific knowledge, MBB did nothing and did not even notify Kopetro, a party known to them (having regard to the interim consent order), that MBB would then seek settlement and redemption from the proceeds of the Megan Avenue property sale.

[64] Further SD5, Miss Ng Kwee Lan (Elizabeth), who was handling the sale and purchase transaction from the conveyancing aspect, testified in examination in chief (Q&A 66 witness statement) that she wrote the letter dated 14 November 2011 (pp. 602-603 CB3/3) to the developer that there was no redemption amount and no deed of receipt and reassignment in view of what was stated in two letters from Messrs Lua & Mansor, both dated 2 November 2011 to Messrs NHCC that there was no order for MBB to sign the deed of receipt and reassignment (p. 596 CB3/3) and the other letter stating the matters which we have reproduced at para. 59 above. The aforesaid evidence was never challenged or cross-examined by MBB's solicitors. In addition to what we have stated at para 59 above, looking at the second letter dated 2 November 2011 from Messrs Lua & Mansor to Messrs NHCC, we agree with the submission of counsel for Liang that there is no requirement for Nga and Liang to retain any money as stakeholders.

In any event, we also agree that it would not make sense since it is categorically stated in the said letter that the redemption sum would come from a different source, ie, the auction proceeds of the Bukit Damansara property. Therefore, we find that MBB's counsel's submission that Nga and Liang were acting as stakeholders is untenable and totally misplaced.

[65] To reiterate, by the 24 October 2011 judgment reproduced in para. 56 above, MBB had the full knowledge that the sale of the Megan Avenue property was going to proceed, which meant that the said property would change hands upon completion within three months. Despite being aware of this situation, in the appeal lodged by MBB to the Court of Appeal against the 24 October 2011 judgment, MBB did not seek for a stay of the said judgment.

[66] Hence, based on the actions of MBB's erstwhile solicitors, Messrs Lua & Mansor, whom by law are agents of MBB, we agree with the submission of counsel for Kopetro that it no longer lies in the mouth of MBB to claim that the transfer to Kopetro was invalid and that the developer had acted against their prior unregistered interest when it is clear that MBB had knowledge of the SPA, consented to the SPA to be proceeded with and in fact compelled the completion of the SPA.

[67] Counsel for MBB contends in para. 8 of the memorandum of appeal that the learned judge has failed to consider that the 24 October 2011 judgment stipulates that the SPA was "to be perfectly completed within three months from the date of the said order" and that the completion on 22 June 2012 was five months beyond the permissible period. With respect, we are of the view that MBB's argument is faulty. This because the said order categorically states that the "Penjualan hartanah plaintif pertama kepada (Kopetro) di bawah perjanjian jual beli bertarikh 12 November 2010 hendaklah disempurnakan sepenuhnya dalam masa tiga bulan daripada tarikh perintah ini." Based on the evidence of Liang that registration is a matter within the jurisdiction of the Land Registrar or Land Administrator, and there was no evidence of the court pursuant to s. 418, NLC directing the Registrar of Titles to register the Kopetro transfer, we agree with the submission of Kopetro and Sparrow & Arrows that "Penjualan" mentioned above in the 24 October 2011 judgment was without dispute completed on 19 January 2011 upon the payment of the balance purchase by Kopetro. Hence, the SPA was completed within the three months period stated in the said order.

[68] Counsel for MBB concedes that whilst MBB could have acted to protect the Megan Avenue property, such as to inform the developer, lodge a caveat or register a charge, but the omission does not absolve the transgression against MBB and to which Kopetro was aware and yet paid over to Messrs NHCC. With respect, in our view, such a concession coupled with such compelling evidence strengthens rather than defeat the respondents' case.

[69] MBB contends that the learned judge erred in failing to abide by the Federal Court decisions of *Damai Freight (M) Sdn Bhd v. Affin Bank Bhd* [2015] 4 CLJ 1; [2015] 4 MLJ 149 and *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944; [2015] 6 MLJ 1. We find there is no merit in this ground of appeal as the factual matrix in both these cases, which we gratefully adopt as summarised in the submission of Sparrows & Arrows, are distinguishable from the material facts in the present appeal.

[70] In *Damai Freight* (*supra*), the salient facts are as follows: PKNS leased a land to Damai pending issuance of the title of the land and Damai applied for a loan from a bank to finance the lease. Damai assigned the lease to the bank under a LACA in 1990 as the title has not been issued. Unknown to the bank, the title of the land was issued and registered under PKNS's name in the year 2003. Meanwhile, Damai defaulted in loan repayment, and the bank obtained a judgment against Damai. Pursuant to its right under the LACA, the bank "... conducted a public auction on 28 December 2005 and sold its rights, title and interest under the principal agreement to one Asia Route (M) Sdn Bhd ("the purchaser"), who was the only bidder." and PKNS gave its approval to the bank's aforesaid sale and was prepared to sign its consent to the purchaser, provided that the deed of assignment by way of transfer was forwarded to PKNS. Damai was aggrieved with the bank's auction of the land and filed a suit against the bank based on the ground that "...once the individual title was issued, the bank could not sell its rights to the land under the principal agreement and the LACA, but must first execute a legal charge over the title effect a sale pursuant to the NLC."

[71] The question of law posed for the determination of the Federal Court in *Damai Freight* was "Whether a lender having an absolute assignment of right to land may realise his security under the terms of the assignment, where document of title to the land was issued subsequently, without the need to resort to the remedies provided under the National Land Code". The Federal Court at p. 150 (MLJ) held, among others, that the issuance of the title to the land did not cause the respondent (bank) to lose its security or its power of sale under the LACA. There was nothing in the law that once the IDT was issued, the absolute assignment was extinguished. The case of *Damai Freight* (*supra*) relied on by MBB can be distinguished because Kopetro is not contending that MBB lost its right when the title was issued in 2003, but rather based on the facts and the law applicable which we have established above, MBB lost its right to enforce its right under the LACA because they took no steps to protect their interest for nine years when the sale of the Megan Avenue property to Kopetro occurred, consented to by MBB and the completion of the sale being compelled by MBB's erstwhile solicitors and ultimately the registration of the title in favour of Kopetro. *Damai Freight* case is clearly distinguishable as the present appeal does not

concern MBB's interest being lost due to the issuance of title but rather revolves on the determination of the question of competing for unregistered prior interest (MBB) and registered indefeasible interest (Kopetro) as discussed below.

[72] In *Samuel Naik* case (*supra*), the salient facts are as follows: Majlis Perbandaran Manjung ("MPM"), as the registered owner of a piece of land, entered into a joint venture agreement with the developer ("BMP") to develop the said land. The land was subsequently subdivided into five plots, and pending the issuance of the separate IDT, the subdivided lots were sold to the first group of purchasers who took a loan from the bank. In order to facilitate the granting of the loans, the earlier purchasers executed separate deeds of assignment whereby they assigned absolutely all their respective titles, rights to and/or interest in the lots in favour of the bank. As an added security for the loans, MPM and BMP furnished the bank with letters of undertaking, whereby MPM and BMP expressly undertook to deliver the IDT to the lots, upon issuance thereof, to the bank to facilitate the execution of the relevant memorandums of transfer in favour of each of the earlier purchasers and the execution of legal charges in favour of the bank. On the strength of all the loan agreements, the deeds of assignment and the letters of undertaking, loans were granted and duly disbursed in full to BMP as the purchase price for the lots in question. Unknown to the bank, the separate document of title to the five plots of land were issued in the name of MPM and the bank discovered that MPM and BMP had sold and transferred the same five plots of land with title to the second group of new purchasers. The bank commenced an action against MPM, BMP and the new purchasers seeking, *inter alia*, a declaration that the subsequent sale and purchase agreement signed between MPM, BMP and the new purchasers were void.

[73] The question of law before the Federal Court in *Samuel Naik* case was whether the title of a *bona fide* registered owner without notice under the NLC can be defeated by a non-registered interest of an assignee/lender under an earlier sale and purchase agreement in respect of the same piece of land with other purchasers other than the first applicant. The Federal Court at p. 4 (MLJ) held, among others, that the deeds of assignment by the first set of purchasers to the bank are equitable mortgages. MPM was merely a bare trustee of the five plots of land and had no right or interest to sell to the new purchasers.

[74] In *Samuel Naik* case, the second sale of the same property by the developer to the subsequent purchasers and its transfer by MPM to subsequent purchasers was made without any consent or knowledge of the bank as assignee. In the present appeal, it was not the developer who resold the Megan Avenue property a second time to another purchaser. The resale was done by Sparrows & Arrows as the original purchaser to Kopetro with the express consent of MBB (as assignee of the said property), which was assigned by Sparrows & Arrows for a loan under the LACA coupled with the

2 November 2011 letter from MBB's erstwhile solicitors, Messrs Lua and Mansor under threat of contempt proceeding demanding Sparrows & Arrows to complete the SPA within three months from the date of judgment (24 October 2011).

[75] The Federal Court case of *He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal* [2020] 7 CLJ 271 relied on by MBB can be distinguished by virtue of the interim consent order, the 24 October 2011 judgment and letters dated 2 November 2011 from Messrs Jal & Lim, MBB's solicitors acting for the Gale Force suit and Messrs Lua & Mansor acting for MBB in the 314 Suit.

Whether The Transfer To Kopetro Was Defeasible Under Section 340(2) NLC

[76] Kopetro's registered interest in the Megan Avenue property is valid against the world at large and may only be challenged under s. 340(2) NLC. There is merit in Kopetro's submission as it is supported by the case of *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526; [2007] 1 MLRA 657, which was cited. Gopal Sri Ram JCA (as he then was) in *Au Meng Nam* (*supra*) at pp. 537-539 (CLJ); pp. 659-660 (MLRA) opined, among others, as follows:

> [5] ... If your name appears on the register document of the title then you are the owner of the land as against the whole world. As Abdul Malik Ishak J put it in *Muthammah v. Masri Mohamed* [2000] 2 CLJ 186; [1999] 4 MLRH 98:
>
> > It is now trite law that upon registration, the party in whose favour the registration has been effected will obtain an indefeasible title to or interest in the land (s. 340(1) of the National Land Code 1965). **The phrase 'indefeasible title' means a title or an interest which is free of all adverse claims or encumbrances not noted in the register. It is quite obvious that the effect of registration is to defeat all prior unregistered claims**.
> >
> > ...
>
> [9] I now turn to s. 340(2). **This carves out three circumstances in which the title of "the person for the time being registered as proprietor" "shall not be indefeasible"**. In *Kesarmal & Anor v. Valliappa Chettiar* [1954] 1 MLRA 556; [1954] MLJ 119, the Privy Council held that the latter phrase means "that the title of a proprietor is liable to be defeated." A registered proprietor's title is – to use the words of the judicial Committee – "liable to be defeated" only in an action brought for that purpose. **In other words, there cannot be a collateral attack upon a registered title**. This reinforces the point I made earlier in this judgment. It follows that s. 340(2) qualifies s. 340(1) to afford a registered proprietor interim protection of his or her title. Put differently, the title of a registered proprietor remains indefeasible until it is successfully impeached in proceedings properly brought for that purpose by a person having *locus standi* to bring an action.
>
> (emphasis added)

[77] For ease of reference, s. 340(1) and (2) are reproduced: A

> Section 340. Registration to confer indefeasible title or interest, except in certain circumstances.
>
> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible. B
>
> (2) The title or interest of any such person or body shall not be indefeasible:
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or C
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument;
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law. D

[78] Having examined paras. 55 to 60 of the statement of claim, titled "Penglibatan Dan Peranan Defendan Kedua", we agree with Kopetro's submission that it is apparent that MBB is not relying on the circumstances E in s. 340(2)(b) or (c) as they have not pleaded any particulars of "forgery or by insufficient or void instrument" or any unlawful acquisition under "any purported exercise of any power or authority conferred by written law". In our judgment, the *Samuel Naik* case relied on by MBB cannot apply in the present appeal since the *ratio* of that case, among others, is premised on the F court's finding that the memorandum of transfer in Form 14A was void and insufficient as follows:

> In the present case, as we have stated earlier the relevant Form 14A in respect of the transfer of the title ground of judgment No 02(i)-39-07/2013(A) *Samuel Naik Siang Ting v. Public Bank Berhad* 65 to the appellant was a void instrument and therefore the appellant's title and interest in the Lot was indisputably defeasible. G

But as mentioned earlier, it was never MBB's pleaded case nor was there evidence to establish that Form 14A in the present appeal was void or insufficient instrument and MBB had not even included the developer H (transferor) as a party or called as a witness to challenge Form 14A in the proceedings in the High Court.

[79] In respect of the circumstance under s. 340(2)(a), NLC, we find no allegation of or particulars of fraud have been pleaded either. Thus, the sole circumstance which must be established by MBB to defeat Kopetro's I indefeasible title to the Megan Avenue property is "misrepresentation to which the person or body, or any agent of the person or body, was a party or privy".

[80] We do not see any element of misrepresentation as expressed by Gopal Sri Ram JCA (as he then was) in *Sim Thong Realty Sdn Bhd v. Teh Kim Dar* [2003] 3 CLJ 227 at p. 238 that "[T]he expression "misrepresentation" is merely descriptive of a false pre-contractual statement that induces a contract or other transaction." Instead, we observe as Kopetro submits, MBB had pleaded in para. 60(b) of the statement of claim that "pendaftaran pindahmilik dan gadaian adalah berasaskan kepada salah nyata oleh Def-1, Def-3 dan Def-4 adalah tidak sah *ab initio*." Hence, based on the pleaded case of MBB, we agree with Kopetro's submission that any challenge by MBB under s. 340(2)(a), NLC is bound to fail.

[81] In so far as the factual evidence leading to the registration of the transfer, we find that MBB did not discharge its burden to prove that Kopetro or its agents had made any "false pre-contractual statement that induces a contract or other transaction" or "representation that is untrue" (see *Abdul Ghani Abdullah v. EON Bank Berhad; HLB Holdings Berhad (Third Party)* [2010] 1 LNS 1796; [2011] 8 MLJ 761 (HC)) which led to the registration of the Megan Avenue property in its favour. None of MBB's witnesses, Miss Aerrene Eng Tiong Mei (SP1), Miss Mak Kuan Heong (SP2) and Puan Rafeah (SP3), gave evidence of Kopetro being a party to or privy to any misrepresentation.

[82] Since MBB had failed to discharge their onus of proof and did not bring themselves within the three legal circumstances in which an indefeasible interest by registration is rendered defeasible, we find merit in Kopetro's submission that the learned judge had correctly dismissed prayer 61(a) of the statement of claim, namely, "Deklarasi di bawah s. 340(2)(a), (b) dan/atau (c) dan s. 340(3) Kanun Tanah Negara 1965 bahawa pendaftaran pindahmilik bertarikh 22 Jun 2012 [Megan Avenue property] kepada defendan kedua diistyiharkan tidak sah, disangkal dan terbatal *ab initio* dengan serta merta dan hendaklah dibatalkan dari rekod pendaftaran hak milik oleh Pejabat Tanah dan Galian Kuala Lumpur".

[83] In *PJ T V Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd* [1980] 1 LNS 55; [1980] 1 MLRA 562 at p. 564, Raja Azlan Shah CJ (Malaya) (as HRH then was) (delivering the judgment of the Federal Court) held as follows:

> The concept of indefeasibility of title is so deeply embedded in our land law that it seems almost trite to restate it. **Therefore, the registration of the transfer of the said land under the National Land Code defeats all prior unregistered interests** in that land unless the party who acquires the registered title has been guilty of fraud (see s. 340(2)(a) of the National Land Code).
>
> (emphasis added)

[84] Given our finding that none of the vitiating circumstances in s. 340(2)(a), (b) or (c), NLC has been proved by MBB to defeat the registered interest of Kopetro, we accept Koptero's submission that following *PJ T V Denson* case (*supra*), the registration of transfer of Megan Avenue property on 22 June 2012 under the NLC defeats all prior unregistered interests. This, in our view, will be a complete answer to MBB's claim in the High Court and in the present appeal.

[85] As we have addressed above, there are other reasons raised by MBB to challenge the registered interest of Kopetro: the transfer was made pursuant to the 24 October 2011 judgment, which was subsequently set aside by the Court of Appeal on 3 July 2012, the lack of consent to the sale and non-payment of the redemption sum and registration which occurred after the three months period provided in the 24 October 2011 judgment. As Kopetro correctly submits, at the heart of MBB's appeal is the latter's grievance that the learned judge did not give priority to their earlier unregistered interest as an assignee of the Megan Avenue property as depicted in the relief sought, namely, "Deklarasi hak dan kepentingan plaintif sebagai penerima hak (assignee) terhadap [Megan Avenue property] berdasarkan kepada [LACA] tidak dijejas oleh pendaftaran Pindahmilik bertarikh 22 Jun 2012 dan mempunyai keutamaan terhadap semua pihak lain tidak (inserted by way of oral amendment) termasuk gadaian bertarikh 22 Jun 2012."

[86] In *Doshi v. Yeoh Tiong Lay* [1974] 1 LNS 30; [1974] 1 MLRA 255 at p. 261, Gill CJ (Malaya) (as he then was) (delivering the judgment of the Federal Court) stated as follows:

> The Torrens system of registered title of which the Act is a form **is not a system of registration of title but a system of title by registration**. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. **It is the title which registration itself has vested in the proprietor**.
>
> (emphasis added)

[87] We are mindful of the principles accorded to a registered interest under the Torrens system of land law as propounded in *Doshi* case (*supra*) and *PJ T V Denson* case, which principles therein are being echoed in *Tai Lee Finance Co Sdn Bhd v. The Official Assignee Of The property Of Ngan Kim Yong & Ors* [1983] 1 CLJ 183; [1983] CLJ (Rep) 387; [1982] 1 MLRA 391 (FC) and *Punca Klasik Sdn Bhd v. Foh Chong & Sons Sdn Bhd & Ors* [1998] 1 CLJ 601; [1996] 3 MLRH 546 (HC). We are also conscious of the fact that although the 24 October 2011 judgment had been overturned by the Court of Appeal, the court did not make any consequential order affecting Kopetro's title. Having regard to the factual matrix in this present appeal

(including consented to the sale to Kopetro) and the authorities referred to, we are compelled to hold that the registration of transfer of Megan Avenue property on 22 June 2012 vests the title in favour of Kopetro and defeats the prior unregistered interest of MBB.

[88] For all the given reasons, which we have discussed above, we therefore, find the learned judge was not plainly wrong when he made the following findings in his grounds of judgment:

> 31. Neither has it been shown to this court by the plaintiff on a balance of probabilities that the second defendant is anything but a *bone fide* purchaser and as such the plaintiff's claim against the second defendant fails.
>
> ...
>
> 40. In regard to the second defendant, neither was the registration of the Phileo Avenue property achieved by misrepresentation to the detriment of the plaintiff. As such this Court dismissed the plaintiff's prayers in (a), (b) and (c) of paragraph 61 of the Statement of Claim.
>
> 41. Likewise, the plaintiff's claim under paragraph 61(d) is dismissed because the facts and evidence do not support the creation of a trust, the second defendant being a *bona fide* purchaser.
>
> 42. The unregistered and unregistrable interest of the plaintiff to the Phileo Avenue property cannot defeat the indefeasible title which the second defendant has to the property. (See s. 340 of the National Land Code and *PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd* [1980] 1 LNS 55, *Tai Lee Finance Co Sdn v. The Official Assignee of the property of Ngah Kim Yong & Ors* [1983] 1 CLJ 387, *Punca Klasik Sdn Bhd v. Foh Chong & Sons Sdn Bhd & Ors* [1998] 1 CLJ 601).

Whether Sparrows & Arrows Has Pre-planned And With Intent To Commit Fraud Against MBB and Executed The Plan With The Intention To Deprive MBB Of The Said property Without Making Any Payment Of The Redemption Sum Due

[89] The evidence shows that MBB had chosen the option to be paid from the proceeds of the auction of the Bukit Damansara property as its redemption money as reflected in the letter dated 2 November 2011 by MBB's erstwhile solicitors, Messrs Lua & Mansor at para. 59 above, and had not stipulated in the interim consent order given by MBB at para. 51 above that the redemption money was to be deducted from the balance purchase price of the sale of the Megan Avenue property. Therefore, we agree with counsel for Sparrows and Arrows that having lost in the tussle to Gale Force in the 314 Suit to obtain the proceeds of the auction sale of the Bukit Damansara property as its redemption money, MBB cannot be allowed to approbate and reprobate, by changing the mode of collection of the redemption money. For this principle of law on the prohibition against an attitude of blowing hot and cold, we rest in a decision of this court in *Cheah Theam Kheng v. City Centre Sdn Bhd (In Liquidation) & Other Appeals* [2012] 2 CLJ 16 at 50 [105].

[90] Based on the matters which we have addressed regarding the chronology of events and the factual matrix of this present appeal including the interim consent order and which was later superseded by the 24 October 2011 judgment, which we have alluded to under the heading "salient facts" and in paras. 50 to 53, 56 to 75 above, we find that MBB has failed to discharge its burden of proof of their pleaded case found in paras. 8(b) and (c) of the statement of claim. The said pleadings read as follows:

> (b) Pada 12.11.2010, Def-1 telah Berjaya menjual dan kemudiannya memindah disebut hartanah tersebut kepada Def-2 tanpa terlebih dahulu mendapat persetujuan dan perlepasan sekuriti tersebut dari P dengan cara salah guna proses Mahkamah, salahnyata dan juga penipuan tanpa membuat bayaran kepada Plt.
>
> (c) Perbuatan tersebut dilakukan melalui perkhidmatan profesional firma guaman Def-3 dan Def-4 yang mewakili Def 1.

In light of what we have discussed above, the argument of counsel for MBB that the agreement to sell under the interim consent order was conditional on receiving payment of the purchase price from the sale of the Megan Avenue property collapses like a deck of cards.

Whether Messrs NHCC (Through Nga And Liang) Acted Fraudulently And In Abuse Of Court Process

[91] Regarding MBB's appeal against Nga and Liang, partners of Messrs NHCC, we shall be dealing with the submissions of both their counsel together unless otherwise stated. At the 19 June 2020 hearing, counsel for MBB submitted that the present appeal against Nga and Liang was only premised on abuse of process and conspiracy to defraud and not professional negligence. This is because the pleadings of the plaintiff were not clear (as can be seen below) and this court had queried regarding the same.

[92] In respect of the grounds of appeal under this head of argument, MBB in submission contends that Nga and Liang committed fraud and abused their position as solicitors and misrepresented the status of the Megan Avenue property when they were well aware of the matters listed below and colluded with Sparrows & Arrows to defraud and cause loss and damage to MBB. Nga and Liang knew that:

(i) Sparrows & Arrows never paid the Sparrows & Arrows judgment;

(ii) under the 10 October 2011 decision, MBB would not recover the Sparrows & Arrows judgment or any settlement sum of RM1.8 million from the proceeds of sale of the Bukit Damansara property;

(iii) the 314 Suit had failed and Sparrows & Arrows remained liable under the Sparrows & Arrows judgment; and

(iv) MBB never re-assigned the Megan Avenue property back to Sparrows & Arrows.

[93] MBB contends that the 314 Suit brought by Nga and Liang was with a collateral purpose to deprive the bank of the Megan Avenue property.

[94] MBB further contends that Nga and Liang committed further abuse of process and fraud by suppressing material facts from the court in the 314 Suit resulting in the *per incuriam* 24 November 2011 judgment wherein both the solicitors were well aware that the 10 October 2011 decision would have an adverse effect on the 314 Suit.

[95] Having examined the pleaded case of MBB against Nga and Liang, in essence, the causes of action appear at paras. 43 and 53, which can be distilled as (i) tort of abuse of process; (ii) misrepresenting and/or misleading the court; and (iii) fraud on the developer *via* letter dated 14 November 2011. We shall examine from the pleading point first. It is trite that parties are bound by their pleadings and all material facts which the party rely on must be pleaded; otherwise, evidence cannot be led on facts that have not been pleaded (*Janagi v. Ong Boon Kiat* [1971] 1 LNS 42; [1971] 2 MLJ 196 at pp. 196-197; *Asia Hotel Sdn Bhd v. Malayan Insurance (M) Sdn Bhd* [1992] 2 CLJ 1189; [1992] 2 CLJ (Rep) 121; [1992] 2 MLJ 615 at p. 620 and p. 622).

[96] Counsel for Nga submits that further and/in the alternative, the plea of fraud in MBB's claim is insufficient to raise the averment of fraud for the court to act on. We agree with the said submission made on the pleadings and the applicable law. Whilst it is trite that the word "fraud" need not be used, in *Three Rivers District Council And Others v. Bank of England (No 3)* [2001] 2 All ER 513, the following principles can be gleaned from the judgment of the House of Lords at pp. 578-579:

(i) fraud or dishonesty must be distinctly alleged, distinctly proved, and sufficiently particularised so as to not be consistent with innocence. Hence, the plaintiff must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent. Facts, matters and circumstances which are consistent with negligence would be insufficient;

(ii) as fraud or dishonesty is a matter of inference from primary facts, the wrongdoer must not only know that he is alleged to have acted fraudulently or dishonestly but must also know the primary facts that would be relied upon at trial to justify the inference. Hence, at trial, the court will not normally allow proof of primary facts which have not been pleaded and will not do so in a case of fraud; and

(iii) It is not open to the court to infer dishonesty from facts, which have not been pleaded, or from pleaded facts which are consistent with honesty. There must be some facts which tilt the balance and justify an inference of dishonesty and this must both be pleaded or proved.

Three Rivers (*supra*) has been approved and applied by our Federal Court in *Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd* [2017] 5 CLJ 418 at pp. 444 to 446 and this court (Court of Appeal) in *CIMB Bank Bhd v. Veeran Ayasamy (Wakil Diri Kepada Letchimi Muthusamy, Si Mati)* [2015] 7 CLJ 289 at pp. 294-296.

[97] In respect of fraud, we agree with the submissions of Nga and Liang that the pleadings on fraud boil down to two complaints as follows:

(i) MBB merely pleaded that Sparrows & Arrows and Liang had knowledge of the 10 October 2011 decision but failed to inform the trial judge of the 314 Suit, who in turn, would not have made the 24 October 2011 judgment if His Lordship knew of the 10 October 2011 decision as a result of Sparrows & Arrows' and Liang's failure or neglect, the trial judge was misled and delivered a judgment that could not be performed ("first complaint") (para. 43 of statement of claim and memorandum of appeal); and

(b) MBB pleaded that the contents of the 14 November 2011 letter were untrue and were issued fraudulently to mislead the developer. As a result, the developer was induced to release the original title, executed the transfer and Messrs NHCC transferred the Megan Avenue property to Kopetro despite knowing MBB's interest ("second complaint") (paras. 53 and 54 of statement of claim and supplementary memorandum of appeal).

[98] Regarding the first complaint, in our opinion, there were no express pleadings of fraud against Nga and Liang. It was not a plea that Sparrows & Arrows and Liang, acted dishonestly and taken at its highest, it can only be said that there was silence and inaction on the part of Sparrows & Arrows and Liang which we address later cannot amount to fraud.

[99] Regarding the second complaint, in our opinion, it was not a plea that Sparrows & Arrows and Liang defrauded MBB. If one is to peruse the contents of the 14 November 2011 letter, it can be seen that Messrs NHCC was merely regurgitating the minutes of the 24 October 2011 judgment to the developer and did not mislead the developer as contended.

[100] To establish the tort of conspiracy to defraud, the elements to be proved on a balance of probabilities as propounded by the Federal Court in *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 584; [2015] 5 MLJ 1 at 17[47] are, among others, the following as held by this court in *SCK Group Bhd & Anor v. Sunny Liew Siew Pang & Anor* [2010] 9 CLJ 389; [2011] 4 MLJ 393 at 399[14]:

> ... there must also be an unlawful object, or, if not in itself unlawful, it must be brought about by unlawful means: see *Davies v. Thomas* [1920] 2 Ch 189 per Warrington LJ, and *Seah Siang Mong v. Ong Ban Chai & Another Case* [1998] 1 CLJ Supp 295 (HC) per Ghazali J (now FCJ). There must

A be a co-existence of an agreement with an overt act causing damage to the plaintiffs. Hence, this tort is complete only if the agreement is carried into effect, thereby causing damage to the plaintiffs. In order to succeed in a claim based on the tort of conspiracy, the plaintiffs must establish:

(a) an agreement between two or more persons;

B (b) for the purpose of injuring the plaintiff; and

(c) acts done in the execution of that agreement resulted in damage to the plaintiff: *Marrinan v. Vibart* [1962] 1 AII ER 869 at p 871 per Salmon J; and *Halsbury's Laws of England* (4th Ed) Vol 45 at p 271, as applied by Ghazali J (now FCJ) in *Seah Siang Mong*.

C (See also *Renault SA v. Inokom Corporation Sdn Bhd & Anor And Other Applications* [2010] 5 CLJ 32; [2010] 5 MLJ 394 (CA) at 407 [33] and [34]). Having regard to the legal principles, we reject MBB's submission at paras. 47 and 52, appellant's submission (No. 1), because the necessary elements to mount a conspiracy claim were not pleaded.

D **19 July 2011 Meeting**

[101] From the evidential point, counsel for Nga and Liang submits that MBB knew of the 10 October 2011 decision. Apart from what we have stated regarding the 10 October 2011 decision which, MBB was fully aware of at E para 62 above, there is another event, ie, the 19 July 2011 meeting which is very critical in the present appeal. The 19 July 2011 meeting was held at MBB's office to discuss the amount stated in the OFS in respect of the Sparrows & Arrows loan as the amendment application was fixed for 21 July 2011. The attendees were:

F (i) Chew and Ling together with Miss Ng Kwee Lan (DW5) from Messrs NHCC;

(ii) representatives from Messrs Jal & Lim as MBB's solicitors in the 223 OS and the gala force execution proceedings, which included Miss Aerrene Eng (PW1);

G (iii) representatives from Messrs Lua & Mansor, MBB's solicitors in the 314 Suit;

(iv) representative from Messrs NHCC, namely, Liang; and

H (v) MBB's personnel, namely, (a) Puan Rafeah of RAQM Department in charge of Ling's accounts and the Gale Force execution proceedings, (b) Miss Mak from Loan Management Department ("LMC") and (c) Mr Norizan, in charge of Sparrows & Arrows loan and HS Dunamis account.

I We note that none of the three witnesses called by the plaintiff bank disclosed the 19 July 2021 meeting in their witness statements, the significance of which becomes apparent from what we have addressed below.

No Communication Between MBB's Inter Departments

[102] Based on the evidence in cross-examination of Miss Aerrene Eng (PW1) and Miss Mak (PW2), it can be seen that MBB and all the relevant officers dealing with the facilities which were discussed at the 19 July 2011 meeting, prior to the 10 October 2011 decision and the 24 October 2011 judgment were aware of each other's respective interest. MBB knew that the parties could not agree on the amount payable by Sparrows & Arrows at the amendment application hearing and the Sparrows & Arrows judgment shall be omitted from the OFS. Miss Mak admitted in cross-examination that though MBB, who was a party to the Gale Force execution proceedings and MBB's solicitors, were present when the 10 October 2021 decision was delivered, there was a total lack of communication between MBB's RAQM and LMC Departments.

[103] Puan Rafeah (PW3) testified that since it had been decided at the 19 July 2021 meeting that the Sparrows & Arrows account would be excluded, there was no need to inform Miss Mak of the 10 October 2021 decision as, in her view, it was not her responsibility. Miss Mak did not see it fit to keep herself informed of the Gale Force proceedings. It was confirmed by Puan Rafeah that the outcome of the 10 October 2011 decision was communicated by Miss Aerrene Eng (PW1) to MBB *via* Puan Rafeah. However, Puan Rafeah admitted during cross-examination that she did not see it fit to inform Messrs Lua and Mansor.

[104] We find there is in evidence MBB's letter dated 23 May 2011 signed by Miss Mak and copied to the RAQM and LMC Departments, whereby MBB informed Sparrows & Arrows, Ling and Chew and another borrower that the LMC Department was authorised to deal on behalf of all relevant departments in MBB on negotiations for a "global proposal" to settle all five accounts and that Sparrows & Arrows should only deal with them. However, we find from the evidence, there was a total lack of coordination as between the RAQM and LMC Departments.

No Communication Between MBB's Own Lawyers

[105] Apart from the fact that there is no communication between MBB's departments, we find there also no communication between MBB's solicitors. This is because the evidence showed Miss Aerrene Eng, partner of Messrs J&L (MBB's solicitors in the Gale Force execution proceedings), did not see it fit to inform Messrs Lua and Mansor, (MBB's solicitors in the 314 Suit) that the Sparrows & Arrows account was excluded from the amended OFS when the decision was delivered on 22 July 2011. This was despite the fact that they were all present at the 19 July 2011 meeting.

[106] Messrs Lua & Mansor had no knowledge of the 10 October 2021 decision until after the 24 October 2011 judgment right up to the time when it issued the two letters dated 2 November 2011 to Messrs NHCC, which we have alluded to earlier. Puan Rafeah gave no instructions to Messrs J&L to inform Messrs Lua and Mansor of the 10 October 2011 decision as we have alluded in para 103 above.

No Concealment By Liang Of the Events Of the Gale Force Execution Proceedings

[107] Miss Mak agreed in cross-examination that Liang's cross-examination of Puan Rafeah in the 314 Suit allowed matters pertaining to the Gale Force proceedings to be alluded to the court. However, when Liang raised issues pertaining to the Gale Force proceedings during cross-examination, MBB's counsel in the 314 Suit objected to the questions giving the reason "I am not prepared because I did not know about the Gale Force matter. We are not the lawyer who handled the Gale Force auction. The action all these things facing the Gale Force handled by another separate solicitor for Maybank ...". Miss Mak in fact conceded in cross-examination that Liang did not deliberately withhold the Gale Force execution proceedings from the court in the 314 Suit.

[108] Further, there is evidence that Messrs NHCC immediately disclosed to MBB *via* a letter dated 24 October 2011 to Messrs Jal & Lim that the decision in the 314 Suit "is in conflict with the decision of Yang Arif Tuan Lee Swee Seng ..." and to therefore withhold the release of the proceeds to Gale Force upon the pronouncement of the 24 October 2011 judgment. Miss Aerrene Eng (solicitor from Messrs Jal & Lim in charge of the Gale Force execution proceedings) admitted in cross-examination that the cheque to Gale Force Sdn Bhd's lawyer, Messrs Ranjit Ooi was delivered in the morning of 24 October 2011 and that Messrs Jal & Lim received Messrs 24 October 2011 letter at 5pm the same day. Although Miss Aerrene Eng agreed that Messrs NHCC's said letter raised serious issues, instead of replying immediately and seeking to find a solution, we find as we have alluded to para 62 above, their response was that a failure to comply with the 10 October 2011 decision would tantamount to contempt of court order.

[109] We find there is evidence of Puan Rafeah in cross-examination that Messrs Lua & Mansor could have informed the court in the 314 Suit of the 10 October 2011 decision. But as the evidence in this present appeal revealed, such was not the case because Messrs Lua & Mansor issued the two letters dated 2 November 2011 to Messrs NHCC and the events and repercussions that followed, which we have alluded to above.

[110] We have stated in para 65 above that MBB could have applied to stay the 24 October 2011 order but did not do so. This material fact is confirmed by Miss Mak that after the 24 October 2011 judgment was delivered, MBB could have applied to stay or vary the said judgment as it was not workable in the light of the 10 October 2011 decision. Whilst she initially said that there were no special circumstances as the reason why MBB did not seek a stay order, she later changed her testimony a day later to say there were special circumstances. It is undisputed MBB did nothing.

[111] MBB contends that the witness Miss Mak (PW2) at the trial was incapable of and could not withdraw the claims against Nga and Liang despite it being suggested during cross-examination and was clarified by the witness in re-examination. We find this contention to be baseless given that the learned trial judge had given his reason as to why the court allowed the withdrawal of the first complaint (referred to as "first limb" in para. 33 of the grounds of judgment). It is clear that the learned trial judge in para. 34 of the grounds of judgment had found from an evidentiary angle, that Miss Mak (PW2), a key witness in the High Court, had displayed a lack of confidence in the evidence adduced by MBB to prove fraud, by agreeing that all who attended the 19 July 2011 meeting were fully aware of each other's interest (para 36 of grounds of judgment) and there was no concealment from Justice Vazeer in the 314 Suit. We, therefore, find there was no error in the trial judge's treatment of Miss Mak's evidence.

[112] Given all that we have stated above, it is our judgment that MBB's contention that Messrs NHCC had committed fraud is wholly misconceived. The learned trial judge was alive to the fact, among others, in para. 35 of the grounds of judgment that "LMC and RAQM had their own lawyers to advise them and it is very obvious to this court that between LMC and RAQM it was very much as if it were akin to the left hand not knowing what the right hand is doing syndrome".

No Abuse Of Process As Alleged

[113] As noted by the learned trial judge, premised on *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed* [1998] 2 CLJ 340; [1998] 2 MLJ 425 at pp. 355-356 (CLJ); p. 438 (MLJ), Gopal Sri Ram JCA (as he then was) (delivering oral judgment) opined:

> In my judgment, the essential elements of the tort of abuse of process are these:
>
> (1) The process complained of must have been initiated;
>
> (2) The purpose for initiating that process must be some purpose other than to obtain genuine redress which the process offers. In other words, the dominant purpose for which the process was invoked must be collateral, that is to say, aimed at producing a result not intended by the invocation of the process; and

A (3) The plaintiff must have suffered some damage or injury in consequence

(see *Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd* [1999] 4 CLJ 533; [1999] 4 MLJ 637 at p. 645)

B **[114]** We agree with the submission of counsel for Nga that in respect of the first two elements, the phrase "purpose for initiating that process" connoted the *mens rea* of Sparrows & Arrows and Nga and Liang at the time the 314 Suit was commenced. Miss Mak agreed during cross-examination that matters that occurred after the 314 Suit was filed, which included the failure to inform the trial judge of the 314 Suit of the 10 October 2011 decision, are C irrelevant and are unable to support the case.

[115] The evidence which does not support MBB's case is the fact that the filing of the 314 Suit was not done by Messrs NHCC but instead was filed by Messrs Wong & Co on 15 April 2011; likewise for the filing of the injunction application and the *ex parte* order was obtained by Messrs Wong D & Co. Since Messrs NHCC took over the conduct of the 314 Suit on 20 June 2011, the firm could not have filed Suit 314 for a collateral purpose. Based on all the evidence, we agree with the submission of Nga and Liang that the 314 Suit was not a frivolous suit which was filed for a collateral purpose given that: E

(i) MBB did not file any application to strike out the 314 Suit for abuse of process;

(ii) MBB had entered into an interim consent order with Sparrows & Arrows to allow the latter to continue with the Megan Avenue property sale and F the 314 Suit was decided in favour of Sparrows & Arrows notwithstanding that the 314 Suit was later set aside by the Court of Appeal.

[116] In this regard, we find that the learned judge had applied the correct test when in para. 35 of the grounds of judgment, His Lordship stated, among G others, that "In regard to third and fourth defendant, it is clear to this court that the Suit 314 had been instituted by the solicitors prior to Messrs Nga Hock Cheh & Co." In addition, based on MBB's pleaded case and the evidence in the present appeal, in our view, the learned trial judge arrived at a correct finding in para. 37 of the grounds of judgment that "it has not H been shown to the satisfaction of this court that there had been an abuse of process and that the defendants were the perpetrators."

I

MBB's Reliefs

[117] MBB submits that MBB is seeking relief premised only on paras. 61(a), (c), (d), (f), (g) and (h) of the statement of claim dated 17 July 2014, which has the following effect:

(i) Sparrows not having a right to transfer the Phileo property to KKP;

(ii) The title should revert to the developer;

(iii) The charge created in favour of CIMB Bank Berhad would prevail;

(iv) The costs and damage suffered by MBB would include the expenses and sums to be paid, to secure a discharge/removal of the charge – and for which Sparrows, KKP and NHCC would have to pay for;

(v) The quantum of damages and the parties who must pay such damages assessed by court will have to be decided at assessment; and

(vi) The costs for the appeal and that at the High Court should be paid to MBB.

[118] Having carefully considered the submissions of all the parties and the records of appeal, we find there is no merit in the appeal of MBB. However, for the sake of argument, with respect we are unable to agree with the aforesaid submission of counsel with regard to the reliefs that MBB is now seeking. At the High Court, MBB was seeking in prayer 61(a) of the statement of claim for a declaratory relief to declare the registration of the property to the second respondent invalid, defeasible and void *ab initio* with immediate effect and it ought to be avoided (dibatalkan) from the transfer of ownership records at the Kuala Lumpur Land Office. At the stage of the High Court proceedings, undoubtedly, MBB was seeking a declaratory relief which would affect the third party with a registered interest who was not before the High Court, ie, CIMB Bank Bhd. Authority for the same is the case of *CKH Engineering Sdn Bhd v. Lim Beng Kit* [2017] 1 LNS 286; [2017] 6 MLRA 55 where this court held that "[it] has a duty to ensure a declaration ought not to be given when third party interest is involved." We find the learned trial judge was correct in dismissing prayer 61(a).

[119] Counsel for MBB submits that the court has the power to order such a re-transfer as Kopetro has no rights to the Phileo property which transfer is subject to the CIMB charge citing ss. 215 and 216, NLC and the High Court cases of *Kasai Reiko v. Annie Lor Lee Fong & Ors; Public Bank Bhd (Intervener)* [2014] 3 CLJ 869; [2014] 7 MLJ 652 which made reference to *Owe Then Kooi v. Au Thiam Seng & Anor & Another Case* [1990] 1 CLJ 311; [1990] 2 CLJ (Rep) 600; [1990] 1 MLJ 234.

[120] At this appellate stage, we are not prepared to allow the appellant to advance a position not taken at the High Court because to accede to the request of MBB by allowing the charge to remain in place when the transfer is expunged from the records will create an odd and incongruous situation of there being no registered proprietor/chargor but there being a charge on the title. We agree with the submission of counsel for Kopetro that MBB's reliance on ss. 215 and 216, NLC is misconceived since those provisions apply to a transfer of land and for the passing of all existing interests and restrictions than existing on the land. Here in the present appeal, both of the said provisions do not apply since MBB is asking for the expungement of Kopetro's title, so it does not involve any transfer.

[121] Further, we cannot allow MBB's request because the proposed prayer contradicts their own written submission dated 23 February 2018, which prays for the appeal be allowed and the court makes the following orders:

> 70.1. that KPP transfers the property to MBB free from encumbrance and to cause CIMB to discharge the Charge over the property.

We observe that the aforesaid prayer contradicts the current position taken by MBB as follows:

(i) If Kopetro's transfer is expunged, then it is impossible that "KKP transfers the property to MBB free from encumbrance"; and

(ii) MBB is asking for "CIMB to discharge the charge over the property", ie, a relief against a third party not before the court.

Costs Against MBB Was Grossly Excessive And Erroneous

[122] Regarding its appeal on costs, MBB in para. 16 of the supplementary memorandum of appeal states:

> 16. Hakim yang terpelajar telah terkhilaf dengan menentukan melalui budi bicaranya untuk Perayu membayar kos yang melampau sebanyak RM100,00.00 kepada pihak-pihak tanpa melihat bahawa Perayu telah mengalami kerugian yang banyak disebabkan oleh tindakan Responden-responden yang telah memindah milik hartanah terhadap kepentingan Perayu.

[123] MBB submits that:

> Whilst MBB could have done better in the protection of its security, MBB's action was never made in bad faith and should not be punished with costs of RM400,000 to be paid to the following having regard to the following:
>
> 27.1 Sparrows, the borrower who remains wound up and who never paid the Judgment despite receiving the purchase price for the Phileo property,

27.2 NHCC who actively and hurriedly encouraged payment to themselves although they claim to receive as stakeholders, and who paid out to Sparrows instead, and

27.3 KKP who received the title to the property and charged it to CIMB, despite being aware and having knowledge of MBB's prior interests.

[124] The granting of costs follows the event and is a discretion of the court, *albeit* to be exercised judiciously. The learned trial judge made the award of RM100,000 each to be paid by the plaintiff to the first, second, third and fourth defendants after he had dismissed the plaintiff's claim after a full trial. The submission on costs by MBB impinges on the merits of the case. Having heard the merits of the appeal, we do not find that the learned trial judge erred in his findings and neither is the award of costs too exorbitant.

Conclusion

[125] For all the foregoing reasons, we find there are no merits in the appellant's appeal, which warrants appellate intervention. We, therefore, dismiss the appeal with costs and affirm the High Court's order dated 23 February 2017.